

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Procedures for Reviewing)
Requests for Relief From State)
and Local Regulations Pursuant)
to Section 332(c)(7)(B)(v) of the)
Communications Act of 1934)

WT Docket No. 97-192

REPLY COMMENTS OF CONCERNED COMMUNITIES AND ORGANIZATIONS CONSISTING OF:

U.S. Conference of Mayors, Michigan Townships Association, National Association of Counties

AZ: Town of Paradise Valley

CO: City and County of Denver, City of Lakewood, Greater Metro Telecommunications Consortium consisting of 24 other Colorado local governments

FL: City of Coconut Creek, City of Deerfield Beach, City of Fort Lauderdale

IL: City of Breese, City of Naperville, City of Rockford, City of St. Charles, Village of Western Springs, Village of Lisle, and the Illinois Chapter of NATOA consisting of the City of Chicago, Cook County, and approximately 50 other Illinois municipalities

MI: City of Grand Rapids, City of Detroit and 26 other Michigan municipalities

MN: City of Albert Lea, City of Crookston, City of Edina, City of North Oaks

MO: City of Gladstone, City of Springfield

NC: Piedmont Triad Council of Governments consisting of 24 North Carolina local governments and Town of Chapel Hill

NJ: Bridgewater Township

NV: City of Las Vegas

OH: City of Canton, City of Eastlake

TX: City of Dallas, City of Grand Prairie, and 20 other Texas municipalities

UT: City of Provo

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TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY	1
II.	COURTS HOLD EXCLUSIVE JURISDICTION OVER WIRELESS FACILITY DISPUTES WITH ONLY ONE LIMITED EXCEPTION	3
III.	THE COMMISSION'S PROPOSED APPEAL PROCEDURES ARE BOTH UNAUTHORIZED AND UNWISE	4
IV.	THE COMMISSION LACKS AUTHORITY TO "SECOND GUESS" LOCAL ZONING DECISIONS	5
V.	THE COMMISSION MUST NOT PLACE PUBLIC HEALTH, SAFETY AND WELFARE BEHIND OTHER POLICY GOALS	7
VI.	CONCLUSION	9

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REPLY COMMENTS OF CONCERNED COMMUNITIES AND
ORGANIZATIONS

I. INTRODUCTION AND SUMMARY

Concerned Communities and Organizations ("CCO")¹, by their attorneys, hereby file

¹The Concerned Communities consist of the following local governments and organizations:

U.S. Conference of Mayors is a nonprofit national organization representing mayors of cities with populations over 30,000. Its membership includes more than 1,400 cities and 49 state-municipal organizations. **Michigan Townships Association** is a nonprofit corporation which provides education, exchange of information and guidance to and among township officials and its current membership consists of 1,242 Michigan Townships. **National Association of Counties** is the only national organization representing county government in the United States.

Arizona: Town of Paradise Valley

Colorado: City and County of Denver, City of Lakewood, and Greater Metro Telecommunications Consortium consisting of Adams County, City of Arvada, City of Aurora, City of Brighton, City of Castle Rock, City of Cherry Hills Village, City of Commerce City, Douglas County, City of Englewood, City of Edgewater, City of Glendale, City of Golden, City of Greenwood Village, City of Lafayette, City of Lakewood, City of Littleton, City of Northglenn, City of Parker, City of Sheridan, Town of Superior, City of Thornton, City of Westminster, City of Wheat Ridge

Florida: City of Coconut Creek, City of Deerfield Beach, City of Fort Lauderdale

Illinois: City of Breese, City of Naperville, City of Rockford, City of St. Charles, Village of Lisle, Village of Western Springs and the Illinois Chapter of NATOA consisting of the City of Chicago, Cook County, and approximately 50 other Illinois municipalities

Michigan: City of Detroit, City of Grand Rapids, Ada Township, Bloomfield Township, Byron Township, Canton Charter Township, City of Birmingham, City of Cadillac, City of Eaton Rapids, City of Huntington, City of Kentwood, City of Livonia, City of

reply comments in the above-captioned proceeding pursuant to the Notice of Proposed Rulemaking, FCC 97-303 (released August 25, 1997) ("NPR"). CCO respectfully submit reply comments to support generally the comments of the National League of Cities and the National Association of Telecommunications Officers and Advisors ("NLC-NATOA Comments") and the FCC Local and State Government Advisory Committee Advisory Recommendation Number 7 ("LSGAC Advisory").

For the reasons stated herein, CCO oppose generally the Comments of the Cellular Telecommunications Industry Association ("CTIA Comments"), AT&T Wireless Services, Inc. ("AT&T Comments"), GTE Service Corporation ("GTE Comments"), and Southwestern

	Marquette, City of Rockford, City of Walker, City of Wyoming, Elk Rapids Township, Frenchtown Charter Township, Gaines Charter Township, Grand Haven Charter Township, Grand Rapids Charter Township, Handy Township, Harrison Charter Township Robinson Township, Scio Township, City of Westland, Yankee Springs Township, Zeeland Charter Township
Minnesota:	City of Albert Lea, City of Crookston, City of Edina, City of North Oaks
Missouri:	City of Gladstone, City of Springfield
New Jersey:	Bridgewater Township
Nevada:	City of Las Vegas
North Carolina:	Piedmont Triad Council of Governments consisting of Alamance County, City of Archdale, City of Asheboro, City of Burlington, Caswell County, Town of Chapel Hill, Davidson County, City of Eden, Town of Elon College, Town of Gibsonville, City of Graham, Guilford County, Town of Haw River, City of High Point, Town of Jamestown, City of Lexington, Town of Liberty, Town of Madison, Town of Mayodan, City of Mebane, City of Randleman, Randolph County, Town of Ramseur, City of Reidsville, Rockingham County, and Town of Yanceyville
Ohio:	City of Canton, City of Eastlake
Texas:	City of Dallas, City of Grand Prairie, City of Amarillo, City of Arlington, City of Cedar Hill, City of Coppell, City of Crowley, City of DeSoto, City of Fort Worth, City of Haltom City, City of Hurst, City of Irving, City of Kaufman, City of Keller, City of Kennedale, City of Lancaster, City of Laredo, City of Longview, City of Plano, City of University Park, City of Waxahachie, Town of Addison
Utah:	City of Provo

Bell Mobile Systems, Inc., et. al ("SWB Comments") (collectively, "Industry Commenters" or "Industry Comments").

II. COURTS HOLD EXCLUSIVE JURISDICTION OVER WIRELESS FACILITY DISPUTES WITH ONLY ONE LIMITED EXCEPTION

The NLC-NATOA Comments and LSGAC Advisory correctly note that the Commission lacks statutory authority to take several of the actions proposed in the NPR. Indeed, the Commission seems to propose that the exception allowing Commission preemption in the limited circumstance of regulating "the placement, construction, and modification of personal wireless service facilities on the basis of environmental effects of radio frequency emission to the extent that such facilities comply with the Commission's regulations concerning such emissions" swallow the rule of exclusive judicial remedies. See 47 U.S.C. § 332(c)(7)(B)(iv).

Congressional intent, as expressed in the plain language of Section 332(c)(7), clearly places jurisdiction in local courts for expedited relief. Specifically, Section 332(c)(7)(B)(v) states, in part, as follows:

"Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis." 47 U.S.C. § 332(c)(7)(B)(v).

Subsection (v) goes on to provide that the Commission is only authorized to receive petitions concerning possible violations of subsection (iv) for relief.

Thus, Commission action in this area is restricted. Congress intended all non-subsection (iv) disputes to be resolved case-by-case in local courts. Nevertheless, the Commission and Industry Commenters seek to expand federal initiatives improperly into the traditional local function of zoning and into disputes properly left to local courts.

III. THE COMMISSION'S PROPOSED APPEAL PROCEDURES ARE BOTH UNAUTHORIZED AND UNWISE

NLC-NATOA Comments amply demonstrate that the Commission lacks jurisdiction under Section 332(c)(7)(B)(ii) to engage in the determination of what is a "reasonable period of time" for local government action. NLC-NATOA Comments, at 9-10. Questions regarding whether a State or local government acted within a reasonable time on facilities siting requests belong in local courts and must be determined on a case-by-case basis. Any Commission-created and so-called national average of local action time periods is contrary to the plain language in Section 332.

Moreover, as the CCO Comments and NLC-NATOA Comments explain, the Commission should not misconstrue Section 332 and create duplicative and premature proceedings which are required to be resolved expeditiously in local court. The Commission's proposed interpretation of the phrase "final act" is not consistent with the

Congressional intention of requiring final local administrative action before Commission relief is sought.

The Commission's proposed structure of allowing appeals to the Commission "from an adverse action of a local zoning board or commission while its independent appeal of that denial is pending before local zoning board of appeals" is counterintuitive and wrong.

Just as it would make no sense to allow judicial appeals from Commission bureaus, appeals from local zoning boards or commissions are not ripe until the local appeal process is complete. See CCO Comments, at 31-35; NLC-NATOA Comments, at 8-9. CCO respectfully submit that the Commission not expand its jurisdiction beyond the plain statutory language in Section 332.

IV. THE COMMISSION LACKS AUTHORITY TO "SECOND GUESS" LOCAL ZONING DECISIONS

CCO concur with commenters like NLC-NATOA and New York City who correctly assert that Section 332(c)(7)(B)(v) neither contemplates nor authorizes the Commission to "look behind" the stated basis for local decisions. Industry Commenters such as GTE and Southwestern Bell clearly advocate Commission "second guessing" of decisions and examining local decision-making and motivation. As CCO's Comments note, such a result not only contravenes the letter and spirit of the Act, but also the First Amendment and well-settled principles of federalism.

CCO oppose the suggestion in the GTE Comments that the Commission should review wireless facility siting actions not only on "the stated grounds for the action" but also on the underlying public record "particularly where that record shows substantial opposition based on RF concerns." GTE Comments, at 5. CCO respectfully submit that "substantial opposition" is not the statutory standard of whether Commission relief is appropriate. The statute only precludes regulation "on the basis" of the environmental effects of radio frequency emissions to the extent such facilities comply with the Commission's regulations. 47 U.S.C. § 332(c)(7)(B)(iv). Therefore, the Commission can not look behind the stated basis of the local decision to find references to and opposition based on RF considerations and reverse local action under Section 332 (c)(7)(B)(v).

CCO's Comments and NLC-NATO's Comments explain the difficulty and impossibility of preventing citizens from exercising their free speech rights in local public proceedings and fora. Indeed, SWB Comments acknowledge that "private citizens and community groups have ample opportunity to voice their views on siting issues before local and state governments" as a reason why such parties should not be permitted to petition the Commission under Section 332(c)(7)(B)(v). SWB Comments, at 8. Incredibly, however, SWB contradicts itself by saying that the Commission should preempt local facility siting decisions which do not explicitly cite to RF considerations as the reason for denying the permit, if the record and the decision contain references to community opposition based on RF considerations. SWB Comments, at 5.

Nothing in the Act authorizes Commission activity like scouring local records and evidence for mere references to RF emissions or health concerns in order to invalidate local decisions under Section 332(c)(7)(B)(v). Further, the Commission cannot expand the plain statutory word "basis" in Section 332(c)(7)(B)(v) to mean "partial," or to mean that the Commission can go on a fishing expedition into the local record or elsewhere to find references to concerns over RF emissions.

V. THE COMMISSION MUST NOT PLACE PUBLIC HEALTH, SAFETY AND WELFARE BEHIND OTHER POLICY GOALS

The comments in this proceeding (including the Industry Comments) demonstrate that the Commission's proposed course neglects effective monitoring of radio frequency emission compliance and ignores a commitment to protecting the public health, safety, and welfare.

CCO strongly oppose the Industry Commenters who seek to avoid effective local monitoring on the promise and presumption of compliance. CCO respectfully urge the Commission to carefully review the LSGAC Advisory and take to heart the statements contained therein concerning the Commission's proposed limits on local compliance monitoring.

CCO reject the contention in the GTE Comments which wrongly asserts that the penalties for violating FCC rules regarding RF emissions remove the need for monitoring and enforcement mechanisms. GTE Comments, at 7-8. History reveals far too many examples of the threat of sanctions not preventing violations.

Moreover, the Commission's paramount responsibility as a governmental agency is to protect and promote the public health, safety, and welfare. Advocacy and support for an industry and competition can not overcome or subvert this obligation.

Nothing in Section 332 precludes local monitoring of RF emissions for compliance with FCC rules. In fact, Section 332(c)(7)(B)(iv) and (v) only prohibits local regulation "to the extent [wireless] facilities comply" with the Commission's rules. Hence, facilities which do not comply with the Commission's rules are subject to local regulation. Monitoring for compliance is thus appropriate and necessary. Therefore, the Commission should take steps to strengthen, not weaken, monitoring of its RF emission regulations and guidelines.

Accordingly, CCO respectfully submit that the Commission should not prohibit local monitoring of RF emission compliance.

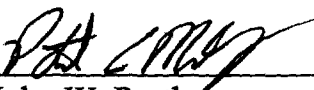
VI. CONCLUSION

In light of the foregoing, CCO respectfully request that the Commission heed the recommendations and warnings in the LSGAC Advisory, the NLC-NATOA Comments and the CCO Comments and not take actions beyond clear statutory language which intrude on local authority, reduce judicial involvement, nor subvert effective protection of the public health, safety, and welfare.

Respectfully submitted,

CONCERNED COMMUNITIES AND ORGANIZATIONS

Dated: October 23, 1997

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CERTIFICATE OF SERVICE

I, Amy L. Vedder, a secretary at the law firm of Varnum, Riddering, Schmidt & Howlett LLP, hereby certify that on this 23rd day of October, 1997, I sent by first class mail, postage prepaid, a copy of the foregoing comments to the persons listed below.

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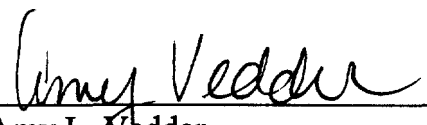
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